

JAN 07 2008

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH EARL GAY,

Petitioner - Appellant,

v.

ROBERT L. AYERS, JR., Warden of San
Quentin State Prison at San Quentin,

Respondent - Appellee.

No. 07-55493

D.C. No. CV-01-05368-GAF

MEMORANDUM *

Appeal from the United States District Court
for the Central District of California
Gary A. Feess, District Judge, Presiding

Argued and Submitted December 3, 2007
Pasadena, California

Before: THOMPSON, WARDLAW, and IKUTA, Circuit Judges.

Kenneth Earl Gay appeals the district court's denial of his motion to litigate a mixed habeas petition in federal court. Gay was convicted and sentenced to death in 1985 for murdering police officer Paul Verna. In 1998, the California Supreme Court reversed Gay's conviction, and Gay was resentenced to death in

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

2000. As a result of Gay's investigation for the penalty-phase retrial, he discovered new evidence that he claims is exculpatory. Gay filed a federal habeas petition in 2001 challenging his guilt determination. The district court determined that seventeen of Gay's claims had not been previously presented to the California Supreme Court and were therefore unexhausted. The district court granted Gay's request to hold the federal habeas proceedings in abeyance pending exhaustion of those claims in state court. Gay filed a new state habeas petition with the state Supreme Court in December 2004.

In June 2006, Gay moved the federal district court to excuse him from the exhaustion requirement. The district court denied Gay's motion, and Gay appealed. We have jurisdiction under 28 U.S.C. § 1291 pursuant to the interlocutory appeal doctrine set forth in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 545–47 (1949), and we affirm.

Gay's unexhausted innocence claims had been pending before the California Supreme Court for about nineteen months when he filed his motion to be excused from exhaustion. The district court correctly ruled that this delay does not amount to a due process violation. The general rule requiring exhaustion, 28 U.S.C. § 2254(b)(1)(A), may be excused if one of two conditions is met: "(i) there is an absence of available State corrective process; or (ii) circumstances exist that render

such process ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B). We look to four factors when determining whether a state’s delay in adjudicating a petitioner’s claim satisfies either of the § 2254(b)(1)(B) exceptions: (1) the length of the delay; (2) the reason for the delay; (3) the defendant’s assertion of his right; and (4) prejudice to the defendant. *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990).

A nineteen-month period of delay does not weigh toward finding an exception. *See Hamilton v. Calderon*, 134 F.3d 938, 939 (9th Cir. 1998) (holding that the California Supreme Court’s review of the petitioner’s case for “less than two years when his latest federal habeas petition was lodged” is not “extreme delay”). Moreover, Gay’s is a complex capital case with an extensive record, justifying a lengthier time for review. *See People v. Dunkle*, 36 Cal. 4th 861, 942 (2005) (highlighting “the unique demands of appellate representation in capital cases” (internal quotation marks omitted)). Although Gay has vigorously pursued his petition before the California Supreme Court, filing two motions to expedite review, he has not demonstrated any more prejudice than any other habeas petitioner awaiting adjudication of his claim in the California state courts. *Cf. Coe*, 922 F.2d at 532. Thus, the district court did not err in rejecting Gay’s claim that

California has an ineffective corrective process and has thus violated Gay's due process rights.

AFFIRMED.